No. 48384-0-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,
Petitioner,

v.

DORCUS ALLEN,
Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

BRIEF OF RESPONDENT

GREGORY C. LINK
Attorney for Respondent

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Constitution

Washington Supreme Court

Washington Court of Appeals

United States Supreme Court

Statutes

Court Rules

Other Authorities

A. INTRODUCTION

Where a jury has reached a verdict on a factual question in a prior trial involving the same parties, the party against whom the verdict was entered cannot seek to relitigate the issue again. Here, a jury in Dorcus Allen's first trial returned special verdicts answering "No" to the question of whether the State had proved two aggravating circumstances beyond a reasonable doubt. After the Supreme Court reversed Mr. Allen's convictions due to the egregious misconduct of the prosecutors, the trial court granted a defense motion to prevent the State from relitigating the aggravating factors.

Although it termed the issues as purely "academic" in the trial court, the State asked this Court to grant discretionary review. The State did so despite its inability to offer any authority that permits, much less requires, a trial court to ignore a previous jury's special verdict resolving a factual issue against the State. In fact, controlling precedent fully supports the trial court's ruling.

A commissioner of this Court granted review.

B. ISSUES PRESENTED

1. Where the parties agree the issue presented is wholly "academic," can that academic error constitute probable error which substantially alters the status quo for purposes of RAP 2.3?

2. Where a prior jury verdict unanimously concludes the State did not prove a fact beyond a reasonable doubt is the State free to retry a person on that fact?

C. STATEMENT OF THE CASE

A jury convicted Mr. Allen of four counts of first degree murder, each with a firearm enhancement, and found the State proved aggravating factors that permitted imposition of an exceptional sentence under RCW 9.94A.535. CP 31-34, 39-46. On each count, the jury was also asked to consider whether the State proved two additional factors under RCW 10.95.020.[1] CP 35-38. Specifically, with respect to each of the two aggravating circumstances pertaining to each of the four counts, the four special verdict forms asked the jury, "Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt?" Each time the jury answered "No." *Id.*

[1] Aggravating factors under RCW 9.94A.535 permit a court to impose an exceptional sentence above the standard range. RCW 9.94A.537. A jury finding of an aggravator under RCW 10.95.020 requires a minimum sentence of life without the possibility of parole. RCW 10.95.030.

The trial court polled the jury separately asking each juror whether the verdict was that of the jury and whether it was the juror's individual verdict. CP 14-51. Each juror answered "yes." *Id.*

The trial court imposed an exceptional sentence of 420 years.

Mr. Allen appealed his convictions contending, among other issues, the prosecutors repeatedly misstated the law in their closing arguments requiring a new trial. The State conceded its repeated misstatements of the law were improper. *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015). Noting that misstating the law on a critical issue in the case is "particularly egregious," the Supreme Court reversed the convictions for the state's "prejudicial misconduct." *Id.* at 380, 387. [2]

After remand to the trial court, the Mr. Allen filed a motion to dismiss the RCW 10.95.020 aggravating factors which the jury found the State had not proved beyond reasonable doubt. CP 103-16. The State responded nothing precluded it from seeking to prove those additional facts at a new trial. CP 117-33.

[2] In its brief the State attempts to minimize its fault suggesting the Supreme Court reversed for mere "closing-argument error." Brief of Appellant at 2. However, the Supreme Court made clear it was the prosecutor's egregious and prejudicial actions which required reversal, terming it "prejudicial prosecutorial misconduct."

Relying upon United States Supreme Court precedent, the trial court concluded that facts which elevate the punishment for an offense are elements of a greater offense. Therefore, the court concluded, because the jurors' "unanimous opinion" was that the State had not proved those elements the State could not have another opportunity to do so. 8/7/15 RP 14. In denying the State's motion to reconsider, the trial court found "twelve jurors found you [the State] did not prove that during the course of the first trial" and ruled the State could not litigate that question anew. 10/13/15 RP 10.

A commissioner of this Court granted the State's motion for discretionary review.

D. ARGUMENT

1. This Court should dismiss as improvidently granted review of what the State concedes is an "academic" issue that does not substantially alter the status quo and does not substantially limit either party's freedom to act.

RAP 2.3(b) provides in relevant part:

> . . . discretionary review may be accepted only in the following circumstances:
> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act . . . .

The trial court's ruling is consistent with controlling precedent and the prosecutor cannot show the court committed probable error. Moreover, the ruling does not alter the status quo of either party.

The prosecutor concluded his argument to the trial court by acknowledging:

> To some extent it is an academic exercise. If the jury finds Mr. Allen guilty of four counts of murder in the first degree, which they would have to do to be able to even get to the aggravating factors, it's a mandatory minimum of 80 years in custody, but it's important to get things right as we go forward.

8/7/15 RP 11-12. What the State candidly admits is a purely academic issue hardly alters the status quo or limits the State's ability to act.

The relevant rule, RAP 2.3(b)(2):

> was intended to apply primarily to orders pertaining to injunctions, attachments, receivers, and arbitration, which have formerly been appealable as a matter of right. For these latter sorts of situations, when the status quo or the freedom of a party to act is substantially affected, the drafters chose the less restrictive 'probable error' test

Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541, 1545-46 (1986) (internal quotations and footnotes omitted). Thus, if the trial court's ruling simply alters the litigation status "or limits the freedom of a party to act in the conduct of the lawsuit, even if

the trial court's action is probably erroneous, it is not sufficient to invoke review under RAP 2.3(b)(2)." *State v. Howland*, 180 Wn. App. 196, 207, 321 P.3d 303 (2014) (citing Crooks, 61 Wash. L. Rev. at 1546).

If Mr. Allen is again convicted of four counts of first degree murder with firearm enhancements, and even if he received a sentence at the bottom of the standard range, he would face a sentence of no less than 108 years, 100 years of which is not subject to good time credit. RCW 9.94A.533, RCW 9.94A.540(1)(a); RCW 9.94A.589. Following the first trial, Mr. Allen actually received an exceptional sentence of 420 years. Supp. CP __ (Judgment and Sentence).

Mr. Allen is 44 years old. *Id.* Even a standard range sentence means that if Mr. Allen is again convicted of four counts of first degree murder he will die in prison regardless of whether the sentence is termed "life without parole." As the prosecutor acknowledged below, this is a purely academic question. At most, the ruling only alters the litigation status of the parties; the name attached to the sentence Mr. Allen could receive.

The commissioner granted review concluding "the trial court's decision substantially alters the status quo because this is the State's

only sure opportunity to seek review of the trial court's decision." Ruling at 6. At most, the commissioner's ruling finds the status of the parties *within* the litigation has changed. But, that is not sufficient to merit review. The trial court's ruling has no effect beyond the litigation and thus does not substantially alter the status quo or limit a party's freedom to act. *Howland*, 180 Wn. App. at 207.

Consistent with *Howland*, this Court should dismiss this matter as improvidently granted.

2. The trial court properly found the State cannot ignore the prior jury's unanimous verdict.

a. The jury entered a unanimous "No" verdict regarding the aggravating elements in the first trial.

The doctrine of collateral estoppel generally bars a party from litigating a factual question if that factual issue was decided adversely to the party in a previous proceeding. *State v. Williams,* 132 Wn.2d 248, 254, 937 P.2d 1052 (1997). Four criteria must be satisfied:

> (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of the doctrine must not work an injustice.

In re the Personal Restraint of Moi, 184 Wn.2d 575, 580, 360 P.3d 811 (2015) (citing *Williams,* 132 Wn.2d at 254). The rule in criminal cases is identical to that in civil cases. *See Christensen v. Grant County Hospital Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004) (citing *inter alia Williams,* 132 Wn.2d at 254). Application of the doctrine reveals an independent basis to deny review in this case.

The issues and parties in the prior trial and current trial are identical and the prosecutor wishes to allege the very same aggravating factors which it alleged and which the jury rejected in the first trial of Mr. Allen. That trial ended with a final adjudication on the merits of those facts. The jury returned special verdicts answering "No" to the questions "Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt?"

The jury was polled. Each juror answered yes to the question of whether the verdict was that of the jury as a whole and to the question whether it was the juror's verdict individually. Thus, all 12 jurors unanimously answered that "No" on the special verdict was their individual verdict. Polling a jury is generally evidence of jury unanimity. *State v. Lamar*, 180 Wn.2d 576, 587-88, 327 P.3d 46 (2014). As this Court has observed, where "the jury was polled, there is

no doubt that the verdict was unanimous and was the result of each juror's individual determination." *State v. McNeal*, 98 Wash. App. 585, 596, 991 P.2d 649 (1999), *affirmed*, 145 Wn.2d 352 (2002).

"A special verdict by a jury 'actually decides' the fact for future prosecutions." *State v. Eggleston*, 164 Wn.2d 61, 72, 187 P.3d 233 (2008). The jury's unanimous verdicts on the aggravating elements are final determinations of the issues. Because the jury finally determined the factual issue in a prior trial involving the same parties the first three criteria are met.

The final criteria addresses whether application of collateral estoppel would "work an injustice" and is "concerned with procedural, not substantive irregularity." *Thompson v. Department of Licensing*, 138 Wn.2d 783, 795–99, 982 P.2d 601 (1999). This focus addresses the concern that the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the first proceeding. *Christensen*, 152 Wn.2d at 309.

The State cannot possibly contend that the more than seven-week trial did not afford it a full and fair opportunity to ligate the factual issue. Indeed, those issues were fully litigated but in the end decided by a unanimous jury against the State. It would be patently

unfair to permit the reversal occasioned by the State's own egregious misconduct to allow the State another opportunity to litigate these issues.

Each of the elements of collateral estoppel is satisfied.

b. Collateral estoppel applies to criminal case as a matter of common law independent of the Double Jeopardy Clause.

A century ago, the Supreme Court rejected the "proposition of the government . . . that the doctrine of res judicata does not exist for criminal cases except in the modified form of the 5th Amendment" *United States v. Oppenheimer*, 242 U.S. 85, 87, 37 S. Ct. 68, 61 L. Ed. 161 (1916). Undeterred, the State raises that very contention here. The Court explained:

> The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice (*Jeter v. Hewitt*, 22 How. 352, 364, 16 L. ed. 345, 348) in order, when a man once has been acquitted on the merits, to enable the government to prosecute him a second time.

Id., 242 U.S. at 88. Thus, *Oppenheimer* affirmed the dismissal of a criminal indictment where a previous indictment for the same offense had been dismissed on the statute of limitations. Because the prior

proceeding had not resulted in a verdict, the Double Jeopardy Clause did not apply. Instead, the Court relied exclusively on the common law principles of res judicata to bar the second preceding.

In a later case, involving a first prosecution of conspiracy to defraud, resulting in an acquittal, and a second prosecution for the substantive fraud offense, the Court noted there was no double jeopardy bar to the second prosecution. *Sealfon v. United States*, 332 U.S. 575, 578, 68 S. Ct. 237, 92 L. Ed. 180 (1948). However the Court explained

> But res judicata may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings . . . and operates to conclude those matters in issue which the verdict determined though the offenses be different.

Id. (Internal citations omitted). Unlike an examination of the elements of the offenses as required under a double jeopardy analysis, the Court explained:

> the only question . . . is whether the jury's verdict in the conspiracy trial was a determination favorable to petitioner of the facts essential to conviction of the substantive offense. This depends upon the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial.

Id, at 578–79.

Sealfon, like *Oppenheimer,* makes clear that res judicata and collateral estoppel apply independently of the Double Jeopardy Clause

to bar relitigation of factual issues resolved in a defendant's favor even where double jeopardy would not bar a separate conviction. The Court has never retreated from that position.

The Washington Supreme Court has similarly recognized the distinction between double jeopardy and collateral estoppel and recognized that while there is overlap between the two, they remain distinct doctrines. The Court explained, "[d]ouble jeopardy and collateral estoppel are often confused, and have some similarities, and also substantial differences." *State v. Morlock*, 87 Wn.2d 767, 768, 557 P.2d 1315 (1976); *see also, State v. Barton*, 5 Wn.2d 234, 240, 105 P.2d 63 (1940). "Collateral estoppel, or issue preclusion, does apply in criminal cases, and it precludes the same parties from relitigating issues actually raised and resolved by a former verdict and judgment." *State v. Harrison*, 148 Wn.2d 550, 560–61, 61 P.3d 1104 (2003) (citing *Williams,* 132 Wn.2d at 253-54; *State v. Peele,* 75 Wn.2d 28, 30, 448 P.2d 923 (1968)). Missing from this formulation, is any limitation on the doctrine's application to only those facts titled "elements."

In *Ashe v. Swenson* the Court concluded the Fifth Amendment Double Jeopardy Clause as applied to the states through the Fourteenth Amendment Due Process Clause, embodied the common-law doctrine

of collateral estoppel. 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). That Washington courts applied collateral estoppel in criminal cases prior to *Ashe*, and expressly did so independent of double jeopardy provisions, requires that the same is true today. The United States Supreme Court does not define state common law, nor for that matter state constitutional law which affords greater protections than mandated by the federal constitution. When *Ashe* concluded collateral estoppel was embodied in the Double Jeopardy Clause it did not supplant the existing common law in States, such as Washington, which already applied the doctrine to criminal cases. Instead, the effect of the Court's ruling was to merely mandate application of the doctrine in State's that had not done so as a matter of common law.

To be sure, the Court did not conclude that states, such as Washington, which already broadly applied the doctrine in criminal cases, were required to narrow their application. Yet that is the State's argument here. Under Washington law before *Ashe* the doctrine would apply to any factual issue previously decided, but the State contends that after *Ashe* the doctrine does not apply to any factual issue in criminal cases unless that fact is titled an "element" of an offense. That is substantially narrower than the common law and it is substantially

narrower than in civil cases. Further, that contention is completely at odds with the decisions of the both the state and federal supreme courts. *Oppenheimer's* conclusion is that whatever those facts are titled, the jury's verdict on those facts must be afforded no less effect than would be afforded in a civil case. 242 U.S. at 87.

c. Because the State is collaterally estopped from relitigating factual issues decided against it by the previous jury, this Court should affirm the trial court's order.

The ruling granting review in this matter refused to address the collateral estoppel argument solely because it was not raised below. Ruling at 4, n.1. That reasoning is contrary to RAP 2.5(a)

That rule provides:

> A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground.

Id.; *see also*, *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 282, 96 P.3d 386 (2004) (court can affirm a lower court's decision on any basis adequately supported by the record).

Here, the record fully establishes the elements for collateral estoppel. That doctrine provides a separate basis for affirming the trial court's order even though that argument was not presented to the trial

court. This Court should dismiss review as improvidently granted or in the alternative affirm the trial court's order.

3. The trial court correctly found "aggravating circumstances" are elements of a greater offense such that the Double Jeopardy Clause precludes the State's effort to ignore the prior jury verdict.

The jury acquitted Mr. Allen of aggravated murder and convicted him of the lesser offense of first-degree murder. Following reversal of the first-degree murder convictions for prosecutorial misconduct, the trial court properly ruled the State could retry Mr. Allen for first-degree murder but double jeopardy precluded retrial for aggravated murder. Based on outdated caselaw, the State argues that the aggravating circumstances of which the jury acquitted Mr. Allen are not elements and that even if they are, double jeopardy does not apply. Current caselaw demonstrates that the State is wrong on both counts.

a. Aggravating factors are elements of a greater offense.

It is no longer open to debate that

> Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt.

Alleyne v. United States, _U.S. __, 133 S. Ct. 2151, 2155, 186 L. Ed. 2d 314 (2013); *State v. McEnroe,* 181 Wn.2d 375, 389-90, 333 P.3d

402 (2014). It is equally undebatable that the "aggravating factors" of RCW 10.95.020 increase the penalty for the offense of first degree murder.

Indeed, the State does not debate this second point.[3] Instead, it urges this Court to simply ignore it. The State contends that because of a line cases from the Washington Supreme Court, dating back to the decades preceding *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), concluded aggravator factors were not elements this Court must blindly follow that regardless of the contrary holding of the United States Supreme Court. The Washington Supreme Court itself has unanimously recognized the reasoning of its pre-*Apprendi* cases, and the post-*Apprendi* case which rely on them, is inconsistent with *Apprendi* and its progeny. *McEnroe*, 181 W.2d at 389-90.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

---

[3] If the State disagrees with this point, it must then concede that there is no plausible basis on which to claim that trial court's resolution of this "academic" issues has in any way altered the status of the litigation.

U.S. Const. Art. VI. "When the United States Supreme Court decides an issue under the United States Constitution, all other courts must follow that Court's rulings." *State v. Radcliffe*, 164 Wn.2d 900, 906, 194 P.3d 250 (2008).

Only recently this court concluded that on matters of federal constitutional law it was required to follow holdings of the United States Supreme Court and not potentially contrary holdings of the Washington Supreme Court. *State v. Tyler*, __ Wn.2d __, 2016 WL 4272999, at 5–6 (2016). The trial court recognized the reach of the Supremacy Clause, saying "we can only look at what the Supreme Court says and the U.S., which is, a king trumps the state court queen, all of which trumps whatever we're doing down here at the trial level - I think we're the jacks - and we have to follow it." 8/7/15 RP 14-15.

Facts which increase the punishment for an offense are elements of a greater offense. *Alleyne*, 133 S. Ct. at 2162 ("When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense. . . .").

b. The Apprendi line of cases are not simply Sixth Amendment Cases.

The undercurrent of the State's argument is that *Apprendi* is simply a Sixth Amendment case, and thus, the State contends, can have

no bearing on the application of the Fifth Amendment Double Jeopardy Clause. Indeed, it is just this sort of superficial reasoning that was the focus of the Washington Supreme Court's self-criticism in *McEnroe.* 181 Wn.2d at 389-90. It is incorrect to categorize *Alleyne* or *Apprendi*, or any in that line of cases as merely Sixth Amendment cases.

> At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," [Amendment] 14, and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," [Amendment] 6

Apprendi, 530 U.S. at, 476–77. The Court made clear

> [The jury] right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt. *United States v. Gaudin,* 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L.Ed.2d 444 (1995); *In re Winship,* 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970).

Alleyne, 133 S. Ct. at 2156. Addressing the cases that preceded it, beginning with *Winship*, *Jones v. United States* explained these cases "recognize[] a question under both the Due Process Clause of the Fourteenth Amendment and the jury guarantee of the Sixth." *Jones v. United States*, 526 U.S. 227, 232, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999). *Jones* went further and recognized the question also arose under to the Fifth Amendment Indictment Clause. *Id.* Thus, it is clear, this

line of cases addresses and rests upon several separate constitutional provisions: the Fifth Amendment Due Process and Indictment Clauses; the Fourteenth Amendment Due Process Clause, and the Sixth Amendment right to a jury.

The Court's reliance on *Winship* throughout these cases makes the interrelationship between these various constitutional provisions abundantly clear. *Winship* was a juvenile case and thus could not have rested upon the on the jury-trial right. Instead, *Winship* concluded the right to proof beyond a reasonable doubt of the offense flows from the Due Process Clause. Thus, at a minimum the question of what is an "element" has constitutional implications beyond simply the right to a jury.

Properly understood, *Alleyne*, and the cases that came before it, are concerned with a far broader principle - the question of how to define a "crime" or an "offense" 133 S. Ct. 2156. As *Jones* said:

> [m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt

Jones, 526 U.S. at 232. The Court in *Jones*, *Apprendi* or *Blakely* did not expand the reach of the Fifth, Sixth or Fourteenth Amendments to non-

offense facts, instead, they simply applied those constitutional provisions to that to which they had always applied – the elements of an offense. "The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an "element" or "ingredient" of the charged offense." *Alleyne*, 133 S. Ct. at 2158. What *Apprendi* and its progeny have done is to adopt and regularly apply a straightforward test for determining the answer to the question of what constitutes an element of an offense for these various constitutional provisions. These decisions rejected the amorphous tests which had evolved in the time after *Winship.* In doing so, the Court has now categorically rejected the notion that the label attached to a fact – "element," "sentencing factor," "enhancement," "aggravator," or any other term – has any constitutional significance.

Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) held Washington's aggravating factors must be submitted to the jury and proved beyond a reasonable doubt because they were elements of an offense and not because the Court was creating a new rule under the Sixth and Fourteenth Amendments. *Jones* concluded the facts that increased the punishment of carjacking not only had to be proved to the jury beyond a reasonable doubt, but

must be pleaded in the indictment as required by the Fifth Amendment because they were elements of the offense. The Court did not apply new constitutional protections to "sentencing factors" or "facts which aggravate the punishment." Instead, the Court determined those facts were elements of an offense in the traditional sense regardless of what they were termed. *Alleyne*, 133 S. Ct. at 2160. Based upon that determination, these cases applied traditional constitutional protections to those elements.

c. There is no constitutionally significant distinction between "elements" or "offenses" for purposes of the Fifth, Sixth and Fourteenth Amendments.

The State urges this court to embrace the very logic the United Supreme Court has spent the last 15 years disavowing. The State urges the court to apply the very pre-*Apprendi* reasoning of the Washington Supreme Court decisions despite that the court's recognition of its probable incorrectness. A unanimous Court acknowledged there is significant tension between its post-*Apprendi* decisions and subsequent decisions of the United State Supreme Court. *McEnroe*, 181 Wn.2d at 389-90. The Court acknowledged this tension has arisen because "[w]e have yet to fully weave *Apprendi* into the fabric of our caselaw" and instead the Court continues to rely on pre-*Apprendi* caselaw even when

addressing post-*Apprendi* claims. *Id.* Nonetheless, the commissioner's ruling granting review engages in the same analytically unsound practice here citing the very cases which *McEnroe* notes are in tension with United States Supreme Court decisions. So too, the State contends these very cases, with their sweeping pre-*Apprendi* pronouncements that aggravating factors are not elements, must control in the face of United States Supreme Court cases to the contrary. Indeed, the State has contended that the reason why it is entitled to discretionary review is precisely because the trial court's order precludes the State from seeking greater punishments then is available for convictions of first degree murder alone. Yet, the State insists that fact is afforded no constitutional significance.

Instead, the State urges that it remains constitutionally significant that the facts at issue here have previously been termed "minimum penalty factors" and not elements. Brief of Appellant at 8-9. Based entirely upon the name previously attached to a certain factual finding, "minimum sentencing factor," the State contends Double Jeopardy protections cannot apply. Without a hint of irony in making its argument that the name alone matters, the State accuses Mr. Allen of relying on "semantics." Brief of Appellant at 9.

There is no basis in logic to argue that the elements of an offense for purposes of the proof beyond a reasonable doubt requirement of the Fifth and Fourteenth Amendment Due Process Clauses and the Fifth Amendment Indictment Clause are different from the elements of that offense for purposes of the Fifth Amendment Double Jeopardy Clause. The Fifth Amendment Double Jeopardy Clause applies to the states by virtue of the Fourteenth Amendment Due Process Clause, the same Due Process Clause which *Winship* concluded requires states to prove the elements of the offense beyond a reasonable doubt. That is the same clause which *Apprendi* and *Blakely* concluded requires the government to prove the elements of the offense to a jury. It defies logic to contend the same clause employs different tests when determining what constitutes an "offense" when it applies the Double Jeopardy Clause to the States than when it applies the rights to a jury and proof beyond a reasonable doubt. The Court itself has said

> We see no constitutional difference between the meaning of the term "offense" in the contexts of double jeopardy and of the right to counsel.

Texas v. Cobb, 532 U.S. 162, 173, 121 S. Ct. 1335, 149 L. Ed. 2d 321 (2001).

To contend the "offense" to which the Double Jeopardy Clause applies is different from the "offense" to which Sixth Amendment jury right applies requires the conclusion that the meaning of "offense" is different within the Sixth Amendment itself: "offenses" to which the right to counsel applies (as do double jeopardy protections) and "offenses" to which the right to a jury applies. But that is not the end of it. Since it is clear the Due Process and Indictment Clauses of the Fifth Amendment share a common definition of "offense" with the jury provisions – one must then conclude that within the Fifth Amendment, too, the meaning of "offense" changes between the Double Jeopardy Clause and the Indictment or Due Process Clauses.

But each of these conclusions is impossible in face of the fact that the right to counsel plainly attaches to a proceeding at which a jury considers the elements of offenses or "aggravating factors." The Due Process right to proof beyond a reasonable doubt similarly applies to "offenses" subject to the Double Jeopardy Clause and right to counsel. For this to be true, as it is, the definition of an "offense" for purposes of the jury right must be the same as, not different from, what constitutes an "offense" for the right to counsel. Since the definition of offense is

the same for the double jeopardy and counsel provisions the definition must also be the same for the double jeopardy and jury provisions.

> As a matter of simple justice, it seems obvious that the procedural safeguards designed to protect Apprendi from unwarranted pains should apply equally to the two acts that New Jersey has singled out for punishment. Merely using the label "sentence enhancement" to describe the latter surely does not provide a principled basis for treating them differently.

Apprendi, 530 U.S. at 476. It is no less obvious that the protections of the Double Jeopardy Clause must apply with equal force to offenses which are subject to the Due Process Clause, the Indictment Clause, the jury trial right and the right counsel regardless of the name a state wishes to attach.

Blakely stated its application of *Apprendi*

> reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure.

Blakely, 542 U.S. at 305–06. The requirements that a fact must be submitted to the jury and proved beyond reasonable doubt have little force if the State may simply disregard a jury verdict it does not like. The requirements are hollow if the State may successively submit that "fact" to a jury or juries until it receives the verdict it does like. Rather

than act as "the great bulwark" against oppressive prosecutions, the rights are reduced to mere procedural formalities which are easily circumvented.

d. Existing caselaw does not preclude application of the Double Jeopardy Clause to previously prosecuted offenses.

The Supreme Court's decision in *Monge v. California*, 524 U.S. 721, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998), is often cited as support for the proposition that double jeopardy protections do not apply to "aggravating factors" or other facts subject to the Sixth Amendment jury trial right or the due process right to proof beyond a reasonable doubt. Indeed, the State does so here. Brief of Appellant at 8.

Monge said:

> Historically, we have found double jeopardy protections inapplicable to sentencing proceedings because the determinations at issue do not place a defendant in jeopardy for an "offense."

524 U.S. at 728 (Internal citations omitted). Here, Mr. Allen does not seek to apply double jeopardy provisions to sentencing proceedings. Mr. Allen contends that after a prior jury trial resulted in a unanimous verdict against the State on an element of an offense, double jeopardy provisions prevent the State from submitting that same element and

offense to a second jury. That is within the traditional reach of the Double Jeopardy Clause.

As addressed above, the facts at issue do constitute an element of an "offense." *Monge*, by contrast, did not concern an element of an offense at all. At issue in that case was whether the State could appeal a finding that it had not adequately proved a defendant's criminal history under California's three-strike law. 524 U.S. at 725-27. But it is clear prior convictions are not elements of an offense. *Almendarez-Torres v. United States,* 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998); *State v. Wheeler*, 145 Wn.2d 116, 121, 34 P.3d 799 (2001). That remains true even after *Apprendi*. 530 U.S. at 490. Because they are not elements of an offense it is wholly unremarkable to conclude the State's appeal of the criminal history finding did not place the individual twice in jeopardy for the same "offense." The same cannot be said of the State's effort here to cast aside the prior jury's verdict on an element.

Monge observed:

> the Court has rejected an absolute rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence to which a defendant is exposed.

524 U.S. at 729. After the string of cases including *Apprendi*, *Blakely* and *Alleyne*, that is no longer the case as the Court has in fact embraced the rule that an enhancement, other than the prior convictions at issue in *Monge*, is an element of a greater "offense" any time it increases either the minimum or maximum sentence to which a defendant is expose.

Monge made clear the determination of whether double jeopardy applied turned on the question of whether the fact at issue constitutes an element of an "offense." The fact at issue here is an element of an offense. Thus, nothing in *Monge* precludes application of the Double Jeopardy Clause.

Nonetheless, *Monge* is often cited as precluding application of double jeopardy principles to any verdict on a fact not titled an element. For example it appears in dicta in *State v. Nunez*, *for* the broad proposition that the State is free to retry an aggravator. *State v. Nunez*, 174 Wn.2d 707, 717, 285 P.3d 21 (2012). *Nunez* proclaimed:

> But proving the elements of an offense is different from proving an aggravating circumstance

Id. That statement is precisely the sort of broad pronouncement that *McEnroe* disavowed. Indeed, there is no relevant constitutional distinction between the titles attached to those facts, nor is there any difference in the manner or quantity of proof required to establish them.

Further, as discussed, *Monge* did not concern an element, an aggravating factor, or any a fact that is subject to the Fifth and Sixth Amendment. Instead, *Monge* concerned only an effort to appeal an adverse finding regarding criminal history, a fact which is not an element of any offense and does not implicate any of the constitutional provisions at stake.

That said, the outcome of *Nunez* that a "no" verdict on an aggravator must be unanimous is correct, even if its reasoning is not. Because it is an element the jury's verdict on an "aggravating factor" must be unanimous, as it was here. But again, that is because the aggravator is an element not because there is a relevant constitutional distinction between facts termed "aggravators" and those termed elements.

In *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003), a trial on first degree murder with aggravating circumstances, a capital offense, resulted in a guilty verdict with respect to the elements of first degree murder but a hung jury on the aggravating factor. The trial court entered a conviction on first degree murder. After the conviction was reversed on appeal the State again sought a conviction on aggravated first degree murder. Mr. Sattazahn

contended the Double Jeopardy Cause precluded retrial on the greater offense.

All nine justices agreed the Fifth Amendment Double Jeopardy Clause applied to jury determinations of aggravating factors. Five justices concluded that while jeopardy attached it had not terminated because the jury hung on the aggravating factor and thus retrial was not barred. *Id.* at 107-08; *Id.* at 116 (O'Connor, J. concurring in part). The opinion states the jury

> made no findings with respect to the alleged aggravating circumstance. That result-or more appropriately, that non-result-cannot fairly be called an acquittal "based on findings sufficient to establish legal entitlement to the life sentence.

Id. at 109. The remaining four justices concluded jeopardy terminated upon the trial court's imposition of a life sentence, and thus concluded retrial on the aggravators was barred. 537 U.S. at 119 (Ginsberg, J. dissenting).

However, three of the five justices in the majority explained their opinion would be different had the jury acquitted the defendant of the additional element. In that case, double jeopardy plainly would bar retrial on the greater crime.

> For purposes of the Double Jeopardy Clause, then, "first-degree murder" under Pennsylvania law-the offense of

> which petitioner was convicted during the guilt phase of his proceedings-is properly understood to be a lesser included offense of "first-degree murder plus aggravating circumstance(s).". Thus, if petitioner's first sentencing jury had unanimously concluded that Pennsylvania failed to prove any aggravating circumstances, that conclusion would operate as an "acquittal" of the greater offense-which would bar Pennsylvania from retrying petitioner on that greater offense (and thus, from seeking the death penalty) on retrial.

Sattazahn, 537 U.S. at 112-13 (Internal citations omitted).

The four justice dissent held:

> Comprehending our double jeopardy decisions in light of the underlying purposes of the Double Jeopardy Clause, I conclude that jeopardy does terminate in such circumstances.

Sattazahn, 537 U.S. at 119 (Ginsberg, J. dissenting.).

Thus, seven justices concluded that if the facts were as they are here, Double Jeopardy would bar retrial. Critically, while the jury in *Sattazahn* was hung 9-3 on the additional element, the jury in Mr. Allen's first trial was not. This is exactly the scenario addressed by the three judge plurality, identifying when they, like the four-justice dissent, would find jeopardy had terminated not only to preclude the death penalty but to preclude retrial altogether.

The State contends the decisions in *State v. Benn* and *State v. Kelly* foreclose reliance on a traditional double jeopardy analysis. Brief

of Appellant at 89(citing e.g. *State v. Benn*, 161 Wn.2d 256, 165 P.3d 1232 (2007); *State v. Kelly*, 168 Wn.2d 72, 226 P.3d 773 (2010)). As an initial matter, neither case resembles this case. More importantly, neither case endorsed the State's current position that it is free to ignore the prior jury's verdict.

Benn involved a retrial after the prior jury had not returned a verdict on one of two charged aggravating factors. 161 Wn.2d at 260. After the initial conviction was reversed, the State retried Mr. Benn on aggravated first degree murder but only with respect to the aggravating factor on which the jury had not returned a verdict. *Id.* Without a verdict on the second additional element, retrial on that element is entirely permissible under *Sattazahn,* 537 U.S. at 109.

Kelly did not involve repeated prosecutions as does Mr. Allen's case. Rather the Court simply looked at whether a court could impose multiple punishments in single prosecution based upon single fact. 168 Wn.2d at 77. That is a separate component of double jeopardy analysis than at issue in *Sattazahn* and at issue here. *See North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 l. Ed. 2d 656 (1969) (explaining double jeopardy applies to multiple prosecutions for the same offense or multiple punishments for the same offense).

As *McEnroe* observed, despite its failure to "fully weave *Apprendi* into the fabric of [its] caselaw, the outcomes may well be correct despite the broad pronouncements of distinctions between elements and aggravators. *McEnroe*, 181 Wn.2d at 389. That is true of the holding in *Nunez* regarding the need for unanimity for verdicts on aggravators. *Benn's* allowance of retrial on an aggravator for which the jury did not return a verdict may also be correct. But the potential correctness of those conclusions rests on traditional constitutional and procedural law and not upon a constitutional distinction between elements and aggravators as no such distinction exists.

e. The trial court properly found the State could not disregard the prior jury's unanimous verdict.

The State's claims that constitutional rights rise and fall based solely upon the name attached to a particular proceeding or particular fact. The United States Supreme Court has repeatedly rejected such arguments. In *McEnroe* the Washington court recognized its caselaw's failure to follow that lead. The trial court properly recognized that as a matter of federal constitutional law it was compelled to follow the United States Supreme Court.

E. CONCLUSION

For the reasons above this Court should dismiss review in this matter as improvidently granted. Alternatively, the Court should affirm the trial court.

Respectfully submitted this 5th day of October, 2016.

s/ Gregory C. Link
GREGORY C. LINK – 25228
Washington Appellate Project – 91072
Attorneys for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

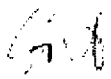
STATE OF WASHINGTON, Appellant, v. DARCUS ALLEN, Respondent.	)))))))))	NO. 48384-0-II

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF OCTOBER, 2016, I CAUSED THE ORIGINAL **BRIEF OF RESPONDENT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JASON RUYF, DPA [PCpatcecf@co.pierce.wa.us] PIERCE COUNTY PROSECUTOR'S OFFICE 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA COA PORTAL
[X] DARCUS ALLEN Bkg #2015064013 PIERCE COUNTY CORRECTIONS 910 TACOMA AVE S TACOMA, WA 98402	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF OCTOBER, 2016.



X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

October 04, 2016 - 4:07 PM

Transmittal Letter

Document Uploaded: 1-483840-Respondent's Brief.pdf

Case Name: STATE V. DARCUS ALLEN

Court of Appeals Case Number: 48384-0

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

PCpatcecf@co.pierce.wa.us